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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON

KELLI GRAY, and all other similarly
situated,) Case No.: CV-09-251-EFS
Plaintiffs,)
v.) MEMORANDUM IN SUPPORT OF
SUTTELL & ASSOCIATES, *et. al.*) PLAINTIFFS' MOTION TO COMPEL
Defendants.) PRODUCTION OF DOCUMENTS
PURSUANT TO PLAINTIFFS'
THIRD, FOURTH, AND FIFTH SET
OF REQUESTS FOR PRODUCTION

EVA LAUBER, DANE SCOTT,
SCOTT BOOLEN, JOEL FINCH and
all other similarly situated,)
Plaintiffs)
v.)
ENCORE CAPITOL GROUP, INC. *et.*
al.)
Defendants)

1 I. Summary of Requests/Motion

2 Plaintiff is requesting that the court Order the Suttell defendants to produce:

3 A. JST Notes related to Attorney fee affidavits, RFP 38, 39, 40 (Ct. Rec.

4 218), the JST Notes that correspond to the seven Layman affidavits of attorney
 5 fees produced by the Suttell Defendants (Ct. Rec. 156-1) and the JST notes for a
 6 Karen Hammer Affidavit for fees that Plaintiffs were able to locate (Ct. Rec. 140-
 7 2). Plaintiffs need the JST notes to evaluate the claims of time spent made in those
 8 affidavits.

9 B. JST Notes related to Spiegel Statute of Limitations, RFP 41 (Ct. Rec.

10 218-5). JST notes for the Spiegel cases identified by the defendants
 11 (approximately 265) (which would show dates of last payment and dates of filing
 12 lawsuit according to defendants' records). The JST notes include information
 13 which Defendant claims show date of last payment and show the date the case was
 14 filed. This information is need for a statute of limitations analysis.

15 C. Detailed Declarations of Attorney Fees filed by Suttell Defendants in

16 Washington courts, Interrogatory 13, RFP 7, RFP 23. Defendants only produced
 17 seven declarations, all from Patrick Layman. Plaintiffs located an additional
 18 detailed declaration of Karen Hammer in the court files. Defendants continue to
 19 refer to these affidavits as part of their "historical analysis" of the amount of the
 20 fee they unilaterally determined was "fair" (as opposed to "reasonable").

II. JST Collectors' Notes Related to Suttell Attorney Fee Declarations (RFP 38, 39 & 40)

Defendant Suttell & Hammer, P.S. uses the JST software to manage its collection system. (Ct. Rec. 140-1, p.10, ln. 21). The JST software creates a date and time stamped log of events related to each collection case which detail all the preparation of documents and actions in the case (except for the attorneys). *See* (Ct. Rec. 139-3, *Kelli Gray JST Notes*).

The Plaintiffs' Third (RFP # 38 & 39), Fourth (RFP # 40)¹ and Fifth (RFP # 41) set of requests for production are JST notes related to the few collection cases in which Suttell filed detailed declarations for attorney's fees (seven for Layman (Ct. Rec. 156-1), one for Karen Hammer (Ct. Rec. 140-2)). The Plaintiffs intend to compare the time stamped JST notes with the detailed attorney fee declarations. Defendant Suttell & Hammer, P.S. refuses to produce the times stamped JST notes.

On November 8, 2010, Plaintiff served Defendant Suttell & Hammer, P.S. with the Third Set of Requests for Production (RFP #'s 38 & 39). (Ct. Rec. 218-1, p.6). The Suttell Defendants response was due on December 8, 2010 and the Defendant did not timely respond or object. (Ct. Rec. 218, p.2). *See Burlington*

¹ The Defendant did not preserve the Plaintiffs' consecutive RFP numbering system in its responses. Requests for Production 40 and 41 are both incorrectly numbered 38 in the Defendant's Responses.

1 *Northern & Santa Fe Ry. Co. v. U.S. Dist. Court for Dist. of Mont.*, 408 F.3d 1142,
 2 1149 -1150 (2005) (waiver of objections). On February 3, 2011, Defendant Suttell
 3 & Hammer, P.S. promised to respond to the RFP by February 7, 2011.
 4

5 On February 7, 2011, the Suttell Defendants served Plaintiffs with its
 6 response but refused to produce anything, instead making the same objections
 7 rejected by the court in its February 4, 2011 Order. (Ct. Rec. 205, *Order*; Ct. Rec.
 8 218-2, 4 & 6, *Discovery Response*).
 9

10 Since June 10, 2010, the Plaintiff has been requesting that Defendant Suttell
 11 & Hammer, P.S. produce time records or explanation of how it arrived at its claims
 12 for fees and any “procedures reasonably designed to avoid any such error.” 15
 13 USC § 1692k(c). On September 7, 2011 Defendant Suttell & Hammer, P.S.
 14 responded that it does not keep contemporaneous time records, but requests
 15 attorney’s fees based on a “historical analysis.” (Ct. Rec. 218, p.61, ln. 14, *RFP* #
 16 7; p. 69, ln. 9-15, *RFP* # 23).
 17
 18

19 On February 7, 2011, Defendant produced a narrative of the memories of
 20 William Suttell and Karen Hammer as its “historical analysis” and stated that there
 21 is no actual evidence of any “historical analysis.” (Ct. Rec. 212-1, p. 6). The
 22 narrative “historical analysis” claims that Suttell determined that based on “the
 23 average amount of time it would take to accomplish various tasks.” (Ct. Rec. 212-
 24
 25

1 1, p. 6, ln. 7-8). No information beyond the belief of Mr. William Suttell is offered
 2 to support what the “average time” of “various tasks” may be.
 3

4 The JST collector’s notes show at least what time the non-lawyers (who
 5 performed almost all of the tasks) spent. (Ct. Rec. 139-3, *Kelli Gray JST Notes*).
 6 The so-called historical analysis also argues that a factor was that on the rare
 7 occasion that a fee declaration was produced, courts did not object so the fee must
 8 be fair. The JST collector’s notes matching these declarations will show the actual
 9 time spent by non-lawyer employees.

10 III. JST Notes related to Spiegel Statute of Limitations, RFP 41, JST notes for
 11 the Spiegel cases identified by the defendants

12 RFP 41 requests production of the JST notes for each of the Spiegel cases
 13 identified by the Defendant. (Ct. Rec. 218-5, p. 44). Defendant Suttell & Hammer
 14 did not timely respond or object to RFP 41 (due December 29, 2010). (Ct. Rec.
 15 218, p. 3, ln. 6-18). On February 3, 2011, Defendant agreed to respond no later than
 16 February 7, 2011. On February 7, 2011, Defendant responded with the same
 17 objections rejected by the court in its February 4, 2011 Order, and produced
 18 nothing (Ct. Rec. 218-6, p. 52).

19 The JST software states the alleged date of last payment and the date that
 20 Suttell served and filed the state court lawsuits. *See* (Ct. Rec. 139-3, *Kelli Gray*
 21 *JST Notes*). With this information the Plaintiff will be able to determine the alleged

1 date the statute of limitation began to run (date of last payment) and the date the
 2 lawsuit was filed for each Spiegel case. This information directly relates to
 3 Plaintiff's UCC-2 four year statute of limitation class allegations.
 4

5 RFP 41 also relates to the attorney fee issue. The Spiegel JST notes will
 6 show also the actual time spent by non-lawyer employees performing "various
 7 tasks" and provide a sufficient sample size to determine what the "average time"
 8 performing those tasks may be.

9

10 IV. Suttell declarations of Attorney Fees, Interrogatory 13, RFP 7, RFP 23,

11 On June 10, 2010, Plaintiff Gray served the Second Set of Interrogatories
 12 and Requests for Production requesting:

13
 14 INTERROGATORY NO. 13. Please list all cases in which an affidavit of attorney
 15 fees that details date, time spent, service (description) was specifically listed in detail and
 16 provide: the name of the parties, address of the defendant, phone number of the
 17 defendant, the jurisdiction (which court), the case name, the case number, the disposition,
 18 the amount of any judgment obtained, the amount of any judgment paid, the Suttell
 19 account or file number, the identity of the original creditor.

20 (Ct. Rec. 140-1, p. 9, ln. 1-5).

21 REQUEST FOR PRODUCTION #7. Please produce all documents that relate to
 22 contemporaneous attorney time keeping, time keeping, determination of time spent, or
 23 billing records, fee agreement, related to all persons against whom Suttell claimed an
 24 attorney fee of Six Hundred and Fifty Dollars (\$650.00) at or before a motion for default
 25 was filed together with all documentation regarding when the record was created and by
 whom in a Court of the State of Washington from August 12, 2005 to the present, in a
 lawsuit to collect a debt.

(Ct. Rec. 218-7, p. 61, ln. 1-5).

1 REQUEST FOR PRODUCTION #23. Please produce all documentation relied on
 2 to determine and/or set the attorney fee rate customarily charged in a locality in which an
 attorney of Suttell has requested an attorney fee from August 12, 2005 to the present.

3 (Ct. Rec. 218-7, p. 69, ln. 6-8)
 4

5 On September 7, 2011, Suttell & Associates, P.S. responded by citing the
 6 “historical analysis” and producing seven detailed attorney fee declarations signed
 7 by Patrick Layman. (Ct. Rec. 140-1, p. 9, ln. 1-5; Ct. Rec. 218-7, p. 69, ln. 6-8).
 8
 9 The response was incomplete.

10 On November 20, 2008, Karen Hammer filed a detailed attorney fee
 11 declaration in *Midland Funding, LLC v. Eric M. Winn*, King County Superior
 12 Court Case No.: 08-2-39359-SEA. (Ct. Rec. 140-2). The Karen Hammer
 13 declaration was not produced by the Defendants. The declaration was discovered
 14 by the Plaintiff while reviewing randomly selected court files. The Plaintiff
 15 requests the Court order the Defendant to produce *all* of the detailed time
 16 declarations of the Suttell attorney's.
 17
 18 Dated this the 11th day of February, 2011

19
 20
 21 *Michael D. Kinkley, P.S.*

22 _____
 23 /s Scott M. Kinkley
 24 Scott M. Kinkley
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 25

1 CM/ECF CERTIFICATE OF SERVICE
2

3 I hereby certify that on the 11th day of February, 2011, I electronically filed the
4 foregoing with the Clerk of the Court using the CM/ECF System which will send
5 notification of such filing to the following:
6

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